WP(C) 3972/2007
BEFORE
HON'BLE JUSTICE RANJAN GOGOI
.
J U D G M E N T

1. The promotion of the Respondent No.6 from Staff Grade-VIII to Officer Grade-'A' made/approved by order dated 6.10.2006 has been assailed in WP(C) No.888 of 2007. The promotion process, in respect of the same post, for the calendar year 2007 initiated by notice dated 30.7.2007 is the subject matter of challenge in the second writ petition i.e. WP(C) No.3972 of 2007. Both the writ petitions were, therefore, heard together and are being answered by this common judgment and order.

2. The facts, in brief, may be noticed at the outset.
According to the petitioner, she joined service in the respondent Corporation as a Typist on 27.4.1977. Thereafter the petitioner earned several promotions and eventually was promoted to a post in Staff Grade-VIII on 01.7.1991. According to the petitioner, the next promotional post is that of Officer Grade-'A' and the required length of service in a post in Staff Grade-VIII is four years. Though the petitioner was eligible for consideration for promotion since 1.7.95, according to her, she has been denied and deprived of such promotion continuously and has been superseded by a number of persons details of whom have been mentioned in the writ petition. The petitioner has further stated that in the year 2001, on the basis of a memorandum of settlement between the management and the workmen of the respondent Corporation, norms were laid down for promotion from Staff Grade-VIII to Officer Grade-'A'. The petitioner has further averred that though as far back as in the year 1983 graduation was laid down as the minimum educational qualification for entry to the cadre of clerk, yet, promotion to Officer Grade-A have been conferred on undergraduate persons who are not qualified and eligible for promotion. According to the petitioner, by virtue of the posts she was holding in the P & A department in the respondent Corporation, in the normal course of her duties, she could come to know of the service profile of all the concerned candidates including herself who are eligible for promotion to Officer Grade-A and further that though the petitioner was more meritorious with higher gradings in the service record, yet, less meritorious candidates have been promoted. In the writ petition filed the petitioner though had mentioned several instances of such unjustified promotions of persons who are less meritorious than the petitioner and also junior to her in service, the challenge in WP(c) No.888 of 2007 is specifically in respect of the promotion of the respondent No.6 to Officer Grade-'A' which was approved by the respondent Corporation on 6.10.2006. As during the pendency of the writ petition i.e. WP(C) No.888/2007 the respondents had issued a notice dated 30.7.2007 initiating a fresh process of promotion to Officer Grade-'A' for the calendar year 2007, WP(C) No.3972/2007 was instituted as according to the petitioner the same, if resorted to, would have the effect of rendering WP(C) No.888/2007 infructuous and superfluous.

3. The respondent Corporation has contested the case by filing an affidavit. According to the respondent Corporation, though a graduation degree was stipulated as the minimum education qualification for entry into the clerical grade there was no change in the educational qualifications prescribed for promotion form the clerical cadre to Officer Grade-'A' and therefore undergraduates continue to be eligible for such promotion, subject to the norms that were circulated by Notification dated 4.8.2001. According to the respondent Corporation, promotion to different posts in Officer Grade-'A' from Staff Grade-VIII is required to be made cadre-wise and it is the most meritorious of the eligible candidates within the cadre, determined by due application of the norms in force, who were promoted to posts in Officer Grade-'A'. In the affidavit filed, the respondents have further stated that under the promotion policy in force on a scale of 100 marks 4

0 marks are earmarked for performance based on the annual apprisal reports (ACRs); 20 marks for qualification; 30 marks for seniority (5 marks for every complet ed year of service) and 10 marks for personal interaction. The ACRs of the prece ding three years are to be taken into account. A consistent outstanding performa nce is to receive the full marks i.e. 40 marks. Similarly, if the ACRs are to re flect consistent performance of very good or satisfactory the candidate is to ge t 35 and 25 marks, as the case may be. In case of an admixture of performance i. e. outstanding for two years and very good for one year, average marks is to be allotted. Similarly, for qualification, a graduate is to get full 20 marks; an i ntermediate is to get 15 marks whereas a High School/Higher Secondary passed can didate is to get 10 marks. The respondents have averred that in the selection he ld on 6th of October 2006 for promotion to the single vacancy that was available in Officer Grade-A in the P & A cadre, the ACRs of the three preceding years i. e. 2003, 2004 and 2005 were taken into consideration. On the basis of the gradin gs recorded in the said ACRs, out of the total 40 marks the petitioner secured 3 8.33 marks whereas the respondent No.6 secured 40 marks. The petitioner secured full marks i.e. 30 and 20 respectively under the head of seniority and qualifica tion whereas the Respondent No.6 secured 30 and 15 marks respectively under the said heads. Under the head of personal assessment the petitioner secured 3.7 mar ks whereas the respondent No.6 secured 8.7 marks. The total marks secured by the petitioner and the respondent No.6, on the scale of 100 was, therefore, 92.03 a nd 93.75, respectively. The respondent NO.6 being more meritorious was, therefor e, recommended for promotion. The said recommendation, according to the responde nts, have been made on due and proper application of the norms in force assessed by a duly constituted departmental promotion committee and there is no infirmit y in the same so as to warrant interference of the Court.

Insofar as the subject matter of WP(C) No.3972 of 2007 is concerned, acc ording to the respondents, the promotion process for the year 2007 is a separate , distinct and different process in which the petitioner will once again be cons idered for promotion and if promotion is found to be due, consequential orders w ill be passed.

4. I have heard Sri N. Dutta, learned Senior Counsel appearing for the peti tioner in both the cases and Sri S. N. Sarma, learned Senior Counsel appearing f or the respondent Corporation. None has appeared for the Respondent No.6, Sri Ba bu Ram Jaishy, in spite of due service of notice.

5. A reading of the pleadings contained in the writ petition registered and numbered as WP(C) No.888/2007 would go to show that the petitioner has highligh ted her grievances with regard to non-promotion and supersession since the year 1995 and has mentioned specific instances of such supersession by her juniors an d ineligible persons commencing from the year 2000. However, the relief prayed f or in the writ petition is interference with the promotion of respondent No.6 wh ich has been approved by order dated 6.10.2006 passed by the Corporation. As the petitioner does not specifically challenge the promotion of any other person ex cept respondent No.6 and furthermore as the other promotions referred to in the writ petition had been made way back in the past, the Court is of the view that it should understand the scope of the writ petition to be confined to what has b een contended to be the unwarranted and unjustified promotion of the respondent No.6, Sri Babu Ram Jaishy.

6. The details of the promotion policy and the norms required to be applied in the assessment of the eligible candidates have already been noted. Admittedl y, the petitioner has secured full marks under the heads of seniority and qualif ication. No pleading has been advanced nor any argument has been made with regar d to the marks awarded to the petitioner under the head of personal assessment. The only contention advanced is that though in the ACRs of the petitioner for th e year 2003 and 2004 she was graded as outstanding, in the ACR of the year 2005 she was graded as above satisfactory i.e. very good. This, according to the peti

tioner, is an act of down- grading, which action, on the strength of the decisio n of the Apex Court in U.P.Jal Nigam vs. Prabhat Chandra Jain, reported in (1996) 2 SCC 363, it is contended, would be justified in law only if reasons for the same are available and the fact of down-grading had been communicated to the pet itioner which was not done in the present case.

7. Even if the aforesaid argument advanced on behalf of the petitioner is t o be accepted in its totality and the decision of the Apex Court in U.P. Jal Nig am (supra) is to be understood in the manner comprehended and argued by the peti tioner, what stares at the face of the Court is that in that event also the peti tioner would be marginally lower in merit than the respondent No.6. If the gradi ng in the ACR of the petitioner for the year 2005 is to be hypothetically read a s outstanding and the petitioner is to be given full marks of 40 under the head of 'confidential rating' the petitioner secures 93.70 marks whereas the responde nt No.6 secures 93.75 marks.

8. In U.P. Jal Nigam (supra) the concerned employee was down-graded in the ACR of a particular year in comparison to the gradings of the previous year/year s. The service Tribunal corrected the situation. The U.P. Jal Nigam having appro ached the High Court against the order of the Tribunal, the High Court took the view that a lower grading in the ACRs of a subsequent year in comparison to the higher grading in the ACR of a previous year would have an adverse affect on the concerned employee and therefore such down-grading is required to be communicat ed to the concerned officer. As the same was not done the approach made by the J al Nigam was negatived by the High Court. The Apex Court clarified the view take n by the High Court to mean that while it is open for the employer to record and award a lesser grading in the ACR of a subsequent year, such a course of action , even if the lesser grading is otherwise a positive grading must be supported b y reasons and must be communicated to the officer to enable him to improve his p erformance. As in the case before the Apex Court, the records, as placed, did no t indicate any reasons for the less meritorious grading given to the concerned e mployee, the Apex Court sustained the ultimate conclusion of the High Court, tho ugh, as it has been noticed, on slightly different grounds. The decision of the Apex Court in U. P. Jal Nigam (supra) has necessarily to be understood to have laid down the law that a lesser grading in the ACR of a subsequent year, even th ough such grading may be a positive grading, must be supported by sufficient rea sons evident from the records. While the employer is free to make an objective a ssessment of the performance of its employees independently in each year, a cour se of action emphasized by the Apex Court in U. P. Jal Nigam (supra) to be absol utely imperative for the healthy growth of the administrative process, naturally , the objectivity of the assessment must be evident from the records of the deci sion making process. However, it cannot be understood that the Apex Court in U. P. Jal Nigam (supra) has laid down any further law to the effect that if the som ewhat lower grading in the ACR of the subsequent year is not communicated to the concerned employee such non-communication, by itself, would vitiate the grading awarded or recorded. This is because the communication that is required to be m ade is only in the form of an 'advisory' i.e. to enable the concerned employee t o improve his performance. This, in the considered view of the Court, is the cor rect ratio of the decision in U. P. Jal Nigam (supra) on which much argument hav e been advanced by both sides. The Court must also notice, at this stage, that i n a subsequent decision of the Apex Court in Union of India vs. Major Bahadur Si ngh, reported in (2006) 1 SCC 368, it has observed in paragraph 8 of the judgmen t that the decision of the Apex Court in U. P. Jal Nigam (supra) is to be unders tood to be restricted only to the employees of the U. P. Jal Nigam.

9. Notwithstanding the above, only to make the discussion complete, the Cou rt has scrutinized the ACRs of the petitioner and the Respondent No.6, as consid ered by the DPC which ACRs have been placed before the Court by the Corporation for its due scrutiny. Such scrutiny goes to show that the 'above satisfactory' g rading given to the petitioner in the ACR of 2005 was recorded by the reporting

authority who had also recorded a finding that the petitioner though is the most experienced clerk has been a late comer to office. The grading 'above satisfactory' awarded by the reporting authority has been accepted by the reviewing authority as well as the final accepting authority who has also specifically put on record that the performance of the petitioner is 'above satisfactory'. In such a situation it cannot be said that the grading awarded to the petitioner is without any reasons. As already held, the non-communication of the said grading to the petitioner, will not vitiate the same so as to warrant interference of the Court.

10. In view of the conclusions reached above, the promotion process for the calendar year 2007 initiated by notice dated 30.7.2007 must now be allowed to be brought to its logical conclusion. Naturally, the case of the petitioner will receive due consideration in accordance with the norms in force.

11. Consequently, both the writ petitions are dismissed, however, without imposing any cost.